PUBLIC PROSECUTOR

v.

ABDUL MAJID A/L MD HANIFF

HIGH COURT MALAYA, SHAH ALAM
DATO' JAMES FOONG J.
[CRIMINAL REVISION NO. 43-13-93]
15 AUGUST 1994

CRIMINAL PROCEDURE: Witnesses - Compellability - Whether a competent witness is also a compellable witness - Spouse witness - Whether competent and compellable to testify against each other - Common Law position - Whether applicable - Evidence Act 1950 ss. 120, 122.

WORDS & PHRASES: "Compelled" - Section 122 Evidence Act 1950 - Implication and import thereof.

This was an application by the Public Prosecutor for a revision of the order of the Magistrate who had ruled, in the course of a preliminary enquiry in respect of a charge of murder under s. 302 Penal Code, that the wife of the accused, being a spouse witness albeit an unwilling one, though a competent witness, could not be compelled to testify for the prosecution. It was clear that in so ruling the learned Magistrate had relied upon and in fact adopted the decision of the House of Lords in *Hoskyn v. Metropolitan Police Commissioner* [1979] AC 474 which held, in essence, that a wife or a husband is incompetent to give evidence against the other on the policy grounds that such allowance would give rise to discord and perjury and would be repugnant to ordinary people. The issue was whether, bearing in mind particularly the provisions of ss. 120 & 122 of the Evidence Act 1950, the Magistrate was right in adopting and applying the decision in *Hoskyn's* case aforesaid and hence, in ruling the way he did.

Held:

[1] The Magistrate had erred in adopting the ruling in *Hoskyn's* case as law for this country. The laws on the issue of spouse witness in this country, though somewhat similar in outline to those in England, are governed by our own Evidence Act 1950 and are different from those in England and references to the said decision and the English Common Law are clearly irrelevant.

[2] By s. 120 of the Evidence Act 1950, it is clear that a spouse witness becomes a competent witness in criminal proceedings against any person. However, by s. 122 of the Act, more specifically by the insertion of the word "compelled" thereinto, it appears that the legislature had pre-accepted the general principle that a competent witness is also a compellable witness. This must be the intention of the Legislature as otherwise there is no necessity for the inclusion of this word, for even without the word "compelled" therein, s. 122 would read just as well and without any ambiguity whatsoever. In other words, there must have been a special purpose for the inclusion of the word "compelled" into s. 122, and what more could it be than a direct reference to the compellability of all spouse witnesses to give evidence with the exeption of communications from one spouse to another except with consent.

[3] It ought to be noted that the Court in this case is dealing not merely with a domestic dispute but with a crime where violence is involved. This being the case it is in the interest of the state and members of the public, therefore, that evidence of that crime should be made freely available to the Court. In the circumstances, the accused's wife in this case is bound to give evidence unless she can point to any exception in the law relieving her from the obligation.

[4] The Court below will proceed with the enquiry and record the evidence of the accused's wife, and if she is unwilling to testify, compel her to do so. However in the course of her testimony, if there had been any communication by the accused to her, such communication cannot be compelled to be disclosed by her unless the consent of the accused is obtained as provided for under s. 122 of the Evidence Act.

[Ruling of Court below set aside].

Cases referred to:
Hoskyn v. Metropolitan Police Commissioner [1979] AC 474 ***(not foll)***
R v. Lapworth [1931] 1 KB 117 ***(foll)***
R v. Leach [1912] AC 305 ***(not foll)***
Ghouse bin Haji Kader Mastan v. Rex [1946] 12 MLJ 37 ***(foll)***
Gimbu bin Sangkaling v. R [1958] SCR 114 ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 120, 122
Penal Code, s. 302
Criminal Evidence Act 1898 (UK)

For the public prosecutor - Wan Ahmad Kamal, DPP
For the respondent - S. Chandragesan; M/s. S.C. Gesan & Associates

JUDGMENT

James Foong J:
This is a criminal revision brought to the attention of this Court by the learned Deputy Prosecutor in respect of a decision made by the learned Magistrate in Rawang.

The accused in this case is charged for murder under s. 302 of the Penal Code. At the preliminary enquiry held before the learned Magistrate in Rawang, the Public Prosecutor attempted to call the accused's wife, Syarifah Marina bte Syed Hamzah (Syarifah in short) as a witness for the prosecution. The accused's Counsel objected to this on the ground that, though she is a competent witness, she cannot be compelled to tender evidence against her own husband. At that stage, Syarifah herself, declared that she was unwilling to render evidence against the accused in Court. Upon this, the learned Magistrate then ruled that Syarifah, though a competent witness cannot be compelled to give any evidence in this case against the accused, as he is her husband. The Magistrate based his decision on the English authority *Hoskyn v. Metropolitan Police Commissioner* [1979] AC 474. Upon this decision, the learned Deputy Prosecutor immediately referred this matter to this Court for determination while the preliminary enquiry was put on hold.

It has been the general common law rule in England that a wife or a husband is incompetent to give evidence against the other except in a few exceptional circumstances. The principle behind this rule is that the family unity must he preserved and, to allow a spouse to testify against the other "would give rise to discord and prejury and would be, to ordinary people repugnant" (per Lord Wilberforce in *Hoskyn's* case).

Through various statutes passed in the 1800s particularly, the Criminal Evidence Act 1898, the position of a spouse witness was somewhat changed in England. The spouse witness became a competent witness. However, though competent, the issue of whether he or she is a compellable witness was unsettled. Since the case of *R v. Lapworth* [1931] 1 KB 117, the law on this matter seemed to rest on the principle that anyone who is a competent witness is also a compellable witness.

This state of law went on for almost 40 years until *Hoskyn's* case where the House of Lords by a majority of 4 to 1 (with Lord Edmund-Davis dissenting), declared that the decision in *R v. Lapworth* was wrong. in its place, the House of Lords restated one of their earlier decision, *R v. Leach* [1912] AC 305, to be the correct law. By this, a spouse witness though a competent witness to testify against each other, is not a compellable witness.

The facts in *Hoskyn's* case are briefly as follows. Hoskyn was charged for wounding his girlfriend. Two days before his trial, he married this girl. At the trial, his girlfriend whom by now has become Mrs. Hoksyn was unwillingly to give evidence. The trial Judge following the principle as set out in *R v. Lapworth* compelled her to testify. She did not give the evidence as expected of her by the prosecution and, was thus treated as a hostile witness. Hoskyn was duly convicted and one of his grounds of appeal was that Mrs. Hoskyn being his wife cannot be compelled to testify against him, her husband. The House of Lords ruled in his favour.

This landmark case obviously must have disturbed and influenced the learned Magistrate in our case, as he was of the opinion that *Hoskyn's* case, being a House of Lords decision overruling all previous heavyweight authorities, must be applicable here.

The laws on this issue of spouse witness though somewhat similar in outline to those in England, are governed by our own Evidence Act. By s. 120 of our Evidence Act, a spouse witness becomes a competent witness in criminal proceedings against any person. However, the question of whether he or she is a compellable witness is not specifically stated anywhere in this said Act except, a little glimpse of it is made under s. 122

Section 122 reads as follows:

> No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

This section, as one will notice does not provide any clear cut answer to the issue. Through my own research, I discovered an early Straits Settlements' authority, *Ghouse bin Haji Kader Mastan v. Rex* [1946] 12 MLJ 37, decided by the then Chief Justice of the Straits Settlements, Sir Mc Elwaine which has some direct reference to this point. In this case, the appellant was charged for kidnapping a girl by the name of Isah then under the age of 16 from her lawful guardian. A day after the kidnap, the appellant married Isah. Isah must have testified against the appellant thus leading to his conviction. One of the grounds of appeal by the appellant was that Isah, being his wife could not be compelled to give evidence against him. After considering various authorities, most of it from Africa, the respected Chief Justice ruled as follows:

> If a witness in this Colony (Colony of Singapore) is "competent" and has been summoned he is bound to give evidence, and to answer all relevant questions. There is no class of witness who can be called "compellable witness". The word "compellable" when used in the Evidence Ordinance relates not so much to a witness as to a type of evidence; and in my opinion a witness may be compelled to give any relevant evidence unless a section enacts that he shall not be compelled to give it.

This decision seems to have found favour in the Borneo States. In the case of *Gimbu bin Sangkaling v. R* [1958] SCR 114, the Court of Appeal in the Combined Judiciary of North Borneo, Sarawak & Brunei, decided to adopt the principle that a competent witness is also a compellable witness. In this case, Gimbu was charged for murdering his father-in-law. Gimbu's wife, the deceased daughter was asked to testify against Gimbu to the effect that she saw Gimbu and his father went out on a frog hunting expedition together and, how Gimbu returned alone. Though she was unwilling to testify, she was compelled to do so by the trial Judge. In adopting the principle of compellability attached to competency, Smith Ag. CJ in this Court of Appeal has this to say:

> Unless the wife can point to any exception in the law relieving her from the obligation to give evidence, then she is bound to give evidence. The whole process of law would be stultified if a witness could without legal excuse decline to give evidence. This Court considers that references to the English common law and to decisions under the Criminal Evidence Act 1898 (of England) are irrelevant.

After careful consideration of all relevant authorities, I am of the view that our laws are different from those in England. Section 120 of our Evidence Act, without dispute from any quarters makes a husband or a wife a competent witness against any person in criminal proceedings. Section 122 of our Evidence Act however, has reference to the issue of compellability by stating that:

> No person who is or has been married shall be **compelled** to disclose any communication made to him during the marriage ...
> (Emphasis is mine)

By inserting the word "compelled" into this section of the Evidence Act, legislature must have pre-accepted the general principle that, a competent witness is also a compellable witness otherwise, there is no necessity for the inclusion of this word. If the legislators' intention was otherwise, s. 122 would read just as well and without any ambiguity if the word "compelled" is not inserted therein. The reading would be better and its meaning direct as can be seen as follows:

> No person who is or has been married shall disclose any communication, made to him during marriage ...

Therefore, there must have been a special purpose for the inclusion of this word "compelled" into s. 122 and, what more could it be than a direct reference to the compellability of all spouse witnesses to give evidence with the exception of communications from one spouse to another except with consent. This must be the intention of the legislature otherwise, the learned law makers would not have stated what is more than necessary. There are great reasonings for the adoption of this principle of compellability and, to my mind besides those stated by the learned Judges in *Ghouse's* and *Gimbu's*, they are best expressed by Lord Justice Lane (as he then was) in *R v. Lapworth* as follows:

> It must be borne in mind that the Court of trial in circumstances such as this where violence is concerned .. is not dealing merely with a domestic dispute between husband and wife, but it is investigating a crime. It is in the interests of the state and members of the public that where that is the case, evidence of that crime should be freely available to the Court which is trying the crime.

It must be noted that though Lord Lane's reasoning above was commented upon and rejected by Lord Salmon in *Hoskyn's* case in the House of Lords (at page 498 of [1979] AC), I am unable to find much justification in the reasons for its rejection. I find Lord Lane's reasoning sound and most applicable to our Malaysian society and attitude which is very much different from that of the United Kingdom.

Having that established, I shall now turn to the decision of the learned Magistrate on this issue. I find that the said Magistrate has erred in adopting the ruling in *Hoskyn's* case as law for this country. I therefore order the learned Magistrate to proceed with the enquiry and to record the evidence of Syarifah, and if she is unwilling to testify, to compell her to do so. However, in the course of her testimony, if there had been any communication by the accused to her, such communication cannot be compelled to be disclosed by her unless the consent of the accused is obtained as provided for under s. 122 of the Evidence Act.